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ABSTRACT

The purpose of this research paper is to identify and examine legal issues and implications of mandatory competency tests (MCT) for high school graduation. The major data source for this investigation was actual court cases and abstracts and interpretations of court cases. It is not the purpose of this paper to perform a general review of competency testing and articles written about it; but to confine the study to the legal aspects of the issue, staying as close as possible to actual case law and interpretations. This paper commences with a section reviewing the legal context in which education is practiced, delineating the right and responsibility of the state to educate and to evaluate student performance. Following that initial section, subsequent sections examine the following specific legal issues involved in the MCT movement: racial discrimination, timing, testing the handicapped, fairness of the test, educational malpractice, and the corrolary issue of employment testing. The final section of this paper draws conclusions concerning the legal implications of MCT as a requirement for the high school diploma. (BW)

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LEGAL IMPLICATIONS OF COMPETENCY TESTING

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INTRODUCTION

Competency testing is a phenomenon which has exploded across the educational scene over the past ten years. Requiring students to achieve a determined level of proficiency for high school graduation offers to the public some tangible evidence of the worth of a high school diploma. As Popham (23) put it, "The public desires reassurances of educational effectiveness," and competency testing would appear to be the one way of providing such reassurances to a public becoming increasingly wary of the educational process and quality.

Jones (19) has found that standardized testing programs that would deny a high school student a diploma for failure to demonstrate a predetermined level of skill in reading, math, and writing, have been proposed or actually implemented at the local district or state levels in all of the fifty states. According to an Information Memo published by the Wisconsin Legislative Council Staff, the peak for legislative and state mandates was 1977-78, when twenty-five states took some action on competency testing. They indicate that by 1981, at least 31 states had some form of student competency testing, with at least half requiring passage of tests for promotion or high school graduation. In 1979, McClung (22) cited DHEW figures indicating that at least one million youth, twelve to seventeen years old, could not read at the fourth grade level.

McClung (22) has identified three stages of Minimum Competency Test (MCT) development. The first stage was the development of statewide assessment programs, designed to help schools. The second stage was the state-mandated MCT which involved the development of state standards for state tests. The third, and present, stage is one of compromise, where the state mandates MCT, but allows the local school boards to decide if the tests are to be used for remediation only, or promotion and/or graduation.

The concept of competency testing for high school graduation does not come on the scene without its problems and issues. As Jones (19) states, " . . . (competency testing) is one of the most dynamic and controversial issues to explode upon the educational law scene in recent decades." The amount of litigation is increasing as more states adopt compulsory or permissive legislation in the area. Carter (17) indicates that there " . . . is potential or actual legal injury to students in denial of a high school diploma."

The hazards of MCT have also been outlined by McClung (22), where he indicates that such requirements could create sub-classes of American citizens, i.e., a first class of 'competents' (diploma), a second class of 'incompetent but dependable' (attendance diploma), and a third class of 'incompetents' (no diploma)."

The trigger for legal analysis, according to McClung (22) is injury. He states, "Using test results as the primary basis for any decision that will cause serious harm to students raises important legal questions." With such a high risk of significant classifications of citizens, it is imperative that the margin for error be minimal. Thus, it is critical that decision-makers, both educational and political, be aware of the legal ramifications of planning and establishing a program of MCT in the schools.

The purpose of this research paper is to identify and examine legal issues and implications of mandatory competency tests for high school graduation. The major data source for this investigation was actual court cases and abstracts and interpretations of court cases. It was not the purpose of this paper to perform a general review of competency testing and articles written about it; but to confine the study to the legal aspects of the issue, staying as close as possible to actual case law and interpretations.

This paper will commence with a section reviewing the legal context in which education is practiced, delineating the right and responsibility of the state to educate and to evaluate student performance.

Following that initial section, subsequent sections will examine specific legal issues involved in the MCT movement, drawing from the small but increasing body of case law to delineate and substantiate the issues.

The following legal issues will be examined:

Issue I: Racial Discrimination
Issue II: Timing
Issue III: Testing the Handicapped
Issue IV: Fairness of the Test
Issue V: Educational Malpractice
Issue VI: The Correlary Issue of Employment Testing

The final section of this paper will draw conclusions concerning the legal implications of MCT as a requirement for the high school diploma.

The Right of the State in Educating and Evaluating Educational Performance

That the state has the right to implement MCT as a graduation requirement appears to be undisputed in case law. This unanimous decision rests on two basic but related concepts. One is that the state has plenary power over education and the second is that the state has created a right to educate its youth, and has a compelling interest in the maintenance of its quality.

The power of the state in education emanates from the "Reserve Clause" of the Tenth Amendment to the Constitution, which states, that " . . . all powers not given to the Federal government in the Constitution are reserved to the state and the people." Thus, while the Federal government is one of limited powers, the powers of the state are broad, limited only by the Federal Constitution and statutes. Because education is not mentioned in the Federal Constitution, it becomes a function of the state.

With that power, the state has created for its youth a right to an education. While rights of citizens are generally thought to reside in the Bill of Rights, courts have stated that rights are not static, but can be created (16). As the state has created a right to an education, it has also created a correlary or implied right to a high school diploma for students who have met the graduation requirements of the state and/or its delegated administrative arm, the local school board. The Court in Debra P. v Turlington (7) said that the state created the expectation that if they (students) attend and pass courses, they will receive a diploma. Such expectation, in effect, creates a property right. And once a right has been created by the state, it cannot be applied arbitrarily or capriciously, or be withdrawn without implementing due process procedures.

But, because the state has the power to regulate education, and has a compelling interest in maintaining its quality, the state has the right to impose any standards it deems necessary and desirable for the high school diploma, as long as those standards are not capricious and/or arbitrarily applied. To the extent that the MCT reflects a change in the requirements for a high school diploma, due process procedures of warning, hearing, and fairness must be applied.

The courts have recognized the responsibility and interest of the state in maintaining educational quality. In Debra P. (7), the Court said that, " . . . the state may condition the receipt of a public school diploma on passing of a test so long as it is a fair test of that which is taught." The Court in Wells v Banks (14) indicated that " . . . local boards have full authority to impose MCT as a requirement for graduation."

The lower Court in Brookhart v Illinois (5) stated that, " . . . MCT adopted by the school district as a requirement for high school graduation

constitutes a reasonable means to determine the effectiveness of the program." The Court of Appeals (6) went so far as to say that the district's desire to ensure the value of a diploma by MCT was "admirable".

It is interesting to note that the Court in Wells (14) recognized MCT as but one of many unspecified means of controlling the quality of education, when it denied a violation of Equal Protection claim where the plaintiffs charged that they were being discriminated against because other school districts used other means than MCT to control the quality of education.

Thus, the courts, recognizing the responsibility of the state in creating the right to an education, and having a compelling interest in maintaining the quality of education, have all upheld the state right to apply MCT as a graduation requirement.

Issue I: Racial Discrimination

Discrimination from a legal standpoint involves the unlawful creation of classes of citizens to whom rights are applied unevenly. The issue can be addressed at a Constitutional or statutory level. At the Constitutional level, the Fourteenth Amendment pertains, while at the statutory level, Title VI (educational institutions) and Title VII (employment) of the Civil Rights Act precludes the arbitrary application of rights based on the unlawful creation of classes. Title VI regulations mandate that " . . . schools must take steps to insure that test materials . . . are selected and administered in a manner which is nondiscriminatory in its impact."

McClung (22) indicates that " . . . some evidence indicates a disproportionate number of Blacks and Hispanics were not able to meet MCT requirements." For example, 75% of Florida black students at the junior level failed the ninth part of the competency test; 40% of the Hispanics failed, while only 15% of the white junior students failed that part of the test.

In the area of competency testing, as in other cases of discrimination, the courts have made an issue of considering the impact of past discrimination when considering present practices. The Court of Appeals in Debra P. (8) remanded the case back to the District Court to consider the impact of past discrimination on the ability of students to pass the test. The fact that Florida maintained a dual system of schools until 1967 was a key point in that consideration. The Court further disallowed the implementation of the MCT as a requirement for the high school diploma for four years, i.e., until all graduating seniors were total products of a unitary system. They did, however, allow the use of such tests for diagnosis and remediation.

In the most recent development in the Debra P. saga, the Court in 1983, (9) four years later, allowed the use of the Florida MCT as a requirement for high school graduation. Plaintiffs once again raised the issue of vestiges of past purposeful discrimination, suggesting that the test is unfair because the black parents of this year's graduating class received an inferior education, and therefore have a more limited ability to help their children succeed in school. The Court rejected this claim, quoting the Court in Swann v Charlotte-Mecklenburg as instructive:

> "(W)e are concerned in these cases with the elimination of discrimination inherent in the dual school systems, not with the myriad of factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds . . . The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts beyond the jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage." (9)

In Anderson v Banks (1), the Court indicated that Equal Protection was not violated even if a disproportionate number of blacks failed the test; but the Court went on to say that the diploma policy, taken together with past de jure segregation, does in fact violate the Equal Protection clause

of the Fourteenth Amendment. As a result, the Court in Anderson, as in Debra P., forbade the use of the diploma policy until such time that all students were educated in a unitary system.

The Court in Anderson (2) also addressed the issue of intent (or purpose) versus effects. Courts in earlier cases, not related to the competency test issue, attempted to differentiate between intent and effect, using the more rigorous "intent" as a standard for Constitutional challenges while applying the less rigorous "effects" standard in deciding statutory claims. More recently this distinction has become blurred if not completely obliterated. But what, the Court in Anderson questioned, proves purpose? The Court answered its own question by citing three standards of proof. One is foreseeability, i.e., the foresight of discrimination which a body should possess as it plans and implements policy. But, the Court said, foreseeability alone is not sufficient proof. The second standard is impact, which is unexplained by any permissable rationale. In other words, the Court indicated that a discriminatory impact is acceptable if it can be explained or rationalized by a legally-acceptable practice. For example, disallowing drivers' licenses to persons with faulty eyesight creates a discriminatory impact on persons with impaired sight versus those without that impairment. But such a discriminatory impact can be rationalized on the basis of the state's right to protect its citizens, a legally-permissible rationale.

The third standard for proving "purpose" is history, i.e., past discriminatory practices. Thus, the Courts in both Anderson and Debra considered the past practice of dual school systems as they decided an Equal Protection challenge based on intent.

McClung (22) states the case as it related to MCT as follows: "(the) . . . legal prohibition against carrying forward effects of past discrimination is a

prohibition against placing one injury (diploma denial) on top of another injury (unequal educational opportunity), meaning, blaming the victim." It would appear, then, that districts with findings of prior discrimination or districts vulnerable to such findings, will be in a more difficult position should such litigation be forthcoming, than districts which have provided equal opportunity in the past.

Thus, MCT, as a means of classifying students in such a way as to have significant impact on their future, has opened the door to Equal Protection challenges. The courts, however, have provided guidance for a legally-acceptable path through this potentially dangerous field.

Issue II: Timing

The timely notice of a change in graduation requirements is wrapped in the concept of Due Process. As indicated earlier, once the state has created a right it cannot apply that right arbitrarily or capriciously. Nor can it deprive a person or class of citizens that right without following due process procedures. These procedures involve giving prior notice that an alteration will take place, and providing the "deprived" citizen a fair opportunity to state his case. As McClung (22) states, "Traditional notions of due process should require adequate prior notice of any rule that could cause irreparable harm to a person's educational or occupational prospects." Thus, timeliness of notice that the graduation requirement will be changed is a central issue in the planning and application of MCT.

In Debra (8) the issue of timeliness was encompassed in the discrimination issue, i.e., the vestiges of past purposeful discrimination. Students who were expected to pass the test, which was a new and additional requirement for graduation, suffered from past discrimantory practices of a dual school system. The Court stated that if the district did not prove that a disproportionate

number of blacks failing the test was not due to the present effects of past intentional discrimination, the district could not use the test as a requirement immediately. The burden of proof fell to the district with the resultant Court-ordered four-year delay for implementation.

In Anderson v Banks (2), the Court also addressed the issue of timeliness, and provided a definition of the concept. It said, "In the Court's view, a notice becomes constitutionally inadequate when it renders the rule or regulation unreasonable." In this case the District Court ruled that the two-year notice was unreasonable, but the Court of Appeals, which issued the definition, reversed the District Court, indicating that, while the two-year notice in itself was not sufficient time, the notice, combined with the fact that the test could be retaken, and that remedial courses were offered to those who did not pass, rendered the notice not unreasonable.

In Brookhart v Illinois (5), a case involving handicapped students, the Court of Appeals said that a notice of a year and one-half to master skills necessary to pass MCT was insufficient to satisfy procedural due process. The Court reasoned that as much as 90% of the material for the test did not appear on the students' IEP; and student programs were not developed to meet the goal of passing the test.

Thus, through the issue of timeliness, MCT requirements have the potential to impinge on the due process rights of students. But once again, the Courts have given some instruction to schools as to how the notification procedures can pass legal muster.

Issue III: Testing the Handicapped

Handicapped students present a unique problem in competency testing, and the issue has been called one of the stickiest in the competency testing

movement. It involves Constitutional issues of due process and equal protection, as well as statutory laws, specifically the Rehabilitation Act (Section 504) and the more recent Education of All Handicapped Children's Act, commonly referred to by its legislative number 94-142.

Two recently litigated cases are instructive. In one case, Brookhart v Illinois (5), eleven handicapped students were denied Peoria, Illinois, high school diplomas because they failed to pass MCT, a policy which the Peoria school board adopted in 1978, and began implementing in 1980. In another case, the Board of Education of Northport East-Northport Union Free School District v Ambach (3), action was filed in behalf of two handicapped students to obtain a judgment validating the issuance of diplomas after an order was obtained invalidating the diplomas previously issued to the handicapped students.

Although in Brookhart, the Court of Appeals (6) ordered the issuance of the diplomas because of a lack of timely notice, the Court provided significant insight for school districts as to the parameters within which districts must operate in terms of competency testing and handicapped students. In Ambach, the Court denied issuance of diplomas to the two handicapped students. In both cases, the Courts maintained a fairly "hard" quality line in favor of non-deviation from standards set for passage of the competency tests leading to the issuance of high school diplomas.

In terms of constitutional issues, it appears that denial of diplomas to students with mental handicaps does not violate either due process or equal protection. The Court in Ambach (4) addressed both of these issues. Speaking of due process, the Court of Appeals indicated that a property interest exists only when the individual has a legitimate claim of entitlement to a benefit. In this case, the Court of Appeals, in reversing a lower court opinion, said

that it was a false premise to assume that these students were capable of completing the requirements for a graduation diploma. The Court went on to say that the district created no expectation that students who failed the competency test will graduate or receive a diploma. This point is true for all students, whether or not they are handicapped.

The Court in Brookhart reiterated this position by commenting that, " . . . by awarding these plaintiffs diplomas, the school district would be putting them in a better position than they would have been had there been no due process violation." (5) (In the Brookhart case, the Due Process violation involved the issue of timeliness, addressed above in this paper)

In ruling in favor of the school district, the Court in Ambach (4) said that no equal protection violation existed, indicating the equal protection does not prohibit all classifications of persons. Equal protection does not require that all persons be treated equally, the Court said; equal laws are mandated, but not equal results.

From a statutory standpoint, the Rehabilitation Act of 1973, Title V, Section 504, prohibits discrimination against qualified disabled persons in all public and private institutions receiving federal assistance. The Courts have placed particular significance upon the word, "qualified," and in so doing have created an important distinction among handicapped types in relation to competency testing.

Both the Courts in Brookhart and Ambach ruled that the denial of diplomas to handicapped students unable to pass the test was not discriminatory under the Rehabilitation Act. In Ambach, the Court reasoned that neither of the handicapped students (one neurologically impaired; the other mentally retarded) was an otherwise "qualified handicapped individual." The Court referred to an earlier definition given by the US Supreme Court in Southeast Community

College v Davis, where they held that an otherwise qualified person is one who is able to meet all of the program's requirements in spite of the handicaps. The Court in Brookhart, arriving at the same conclusion, reasoned that altering of the content of the test to accommodate an individual's ability to learn tested material because of a handicap could be a "substantial modification" as well as a "perversion" of the diploma requirement.

An important distinction, however, was made by the Court in Brookhart (6) in terms of type of handicap. Based on the "otherwise qualified" language in the Rehabilitation Act, the Court said that an otherwise qualified student unable to disclose the degree of learning he possessed because of the format of the test or the environment, would be the object of "discrimination," solely on the basis of the handicap, and this situation would be a violation of the Rehabilitation Act. For such handicapped students, the MCT must be available to them with appropriate modification.

Thus, it appears that, based on the "qualified" language of the Rehabilitation Act, the Court has differentiated between mental impairment and physical handicap in determining the appropriateness of modifying competency tests. From a legal standpoint, it appears that modification to accommodate mental handicaps is not necessary, and in fact, may be considered to be counter-productive to the purpose of MCT; but a school district not modifying the format or environment to accommodate physical handicaps of students may be guilty of discrimination and in violation of the Rehabilitation Act.

The Courts in Brookhart and Ambach agreed also that denial of diplomas for handicapped students not passing MCT does not violate the Education for All Handicapped Children Act (94-142). In Brookhart (6), the Court said that

such a diploma policy was not a denial of "free and appropriate education" as expressed in 94-142. The Court in Ambach (4) said that the Act did not mitigate against withholding of diplomas from handicapped students who were unable to meet the MCT standards. The Court went on to say that the Act requires the State Education Department to formulate rules and regulations pertaining to the physical and educational needs of handicapped children as the Commissioner deems in their best interests. The State, the Court said, must have procedures to assure that testing and evaluation materials and procedures be provided for the placement of handicapped children, implying that there was no language or intent to involve such materials in decision-making for high school graduation.

As indicated earlier, the issue of timely notification also is important when considering MCT for the handicapped students. The Court in Brookhart (6) ruled that a one and one-half year notice was insufficient where as much as 90% of the materials on the test did not appear on the students' IEP's, and students' programs were not developed to meet the goal of passing the test.

The appropriate remedy for applying MCT to handicapped students who may have difficulty passing the test due to mental incapacity, according to the Brookhart Court, is that of providing more time; providing free, remedial, special education classes to ensure exposure to the materials tested on MCT; and a reasonable opportunity to learn that material. The charade of pretending that the student passed, or the passing of a "watered down" test, and then giving the student a high school diploma is not the solution to this complex question, according to Court opinion (6).

Issue IV: Fairness of the Test

The Court of Appeals in Debra P. (8) raised to a significant level the issue of fairness of the test, the passing of which is to be used as a

condition of receiving a high school diploma. Because the Debra case is considered a landmark case, courts in subsequent MCT cases have also considered fairness of the test as a legal point in determining the test as an acceptable criterion for the issuance of a high school diploma. The state may condition the receipt of a public school diploma on passing of a test so long as it is a fair test of that which is taught (8).

A major facet of the "fairness" issue is the concept of validity. Content validity, the usual starting point, according to the American Psychological Association, is " . . . how well a test item represents the performance domain that the test purports to measure." (22) More to the point in MCT is that of another type of validity, closely associated with content validity, namely, curricular validity. Curricular validity, according to Cronbach as cited in McClung (22), measures how well the test items represent objectives of the curriculum. Popham (23) has defined curricular validity as " . . . things that are currently taught."

From the above descriptions, it would appear that curricular validity refers to intent, i.e., what should be taught. The real legal concern does not center necessarily on what should be taught, but rather on what actually is taught.

Thus, the real legal issue appears to involve "instructional" validity, i.e., the measure of whether the district's stated objectives were translated into topics actually taught in the classroom. "Instructional validity is an actual measure of whether the schools are providing students with instruction in knowledge and skills measured by the test," states McClung (22).

Schmidt, et al (25), in reviewing validity in terms of MCT, has identified three domains of validity. One is "objectives," which can be verified through reviewing course syllabi; a second is "curriculum," which can be verified through

textbooks and classroom materials, and the third is "instructional, which can be verified in terms of what is actually taught. The last domain is most significant in terms of case law dealing with MCT.

The Court in Debra (8) questioned the fairness of the test, and noted that the state did not make any effort to ensure that the test covered the material studied. In an evidentiary hearing on the fairness issue, the Court in Anderson v Banks (2) concluded, after much evidence and testimony from expert witnesses both pro and con, that the use of the California Achievement Test as an MCT for high school graduation was a fair test, and on that basis would not be challenged as a graduation requirement.

The school district in Anderson (2) provided three types of evidence to support the CAT as an appropriate MCT for high school graduation. One, they identified category objectives in the CAT, and then identified curriculum activities that matched the objectives. They showed that each objective was taught in each of the basal series as well as in the remedial series. The second type of evidence was a test-content match, paralleling the test content of CAT with text content. Third, the district presented testimony from principals and teachers that the classroom materials identified in the match were actually being used in classroom instruction.

Experts for the plaintiff challenged the test in terms of readability, passage type, and question complexity. The Court, however, sided with the defendant's expert witness, one of the CAT designers, who maintained that the standardization process obviated these concerns, i.e., the issues raised were subsumed in the norming process. The Court concluded that making the test questions easier would simply result in the necessity for higher percentage of correct answers to reach an acceptable passing level.

A further significant point involving instructional validity made by the Court in Anderson, was the ruling that the district did not have to prove that every teacher finished every lesson and assigned every problem. Thus, the Court eased considerably what could have been an almost impossible level of burden of proof on the part of the district.

Particular caution must be taken in the area of instructional validity when applying MCT to handicapped students. The Court in Brookhart (6) warned that the risk of erroneous deprivation of handicapped students' liberty interests in obtaining a high school diploma was overwhelming, given the students' near total lack of exposure to the materials being tested. The Court pointed out that the students' procedural due process was in jeopardy when as much as 90% of the material on the test did not appear on the students' IEP's, and where students' programs were not developed to meet the goals of passing the test.

Walker (27) has concluded that a key point in this issue is what he calls "opportunity to learn," i.e., instructional validity must insure that students have had the opportunity to learn the materials being tested. He has identified five criteria for "opportunity to learn." They are: 1) repeated presentations; 2) flagging of the item, i.e., letting the students know the specific learning which is important; 3) presentation in a form from which students are capable of learning; 4) sufficient time to learn; and 5) provision for retention and remediation.

Some test experts have expressed deep concern over MCT as a graduation requirement. The concerns center around instructional validity, the general arbitrariness of cut-off scores, and the potential confusion of means and ends in terms of curriculum and testing.

Glass (18) stated, "Statewide tests are vulnerable to the charge of insufficient match between what the test measures and what the students are taught." In terms of cut-off scores, Glass (18) in 1978 suggested that arbitrariness is inherent in setting standards for criterion-referenced tests. He went on to say that Florida should suspend MCT as a graduat on requirement because it is based on indefensible technology, i.e., non-validated items and pass/fail standards which are set capriciously and arbitrarily.

Pullin (24) a former teacher and the attorney for the plaintiffs in the Debra case, concurs with the claim that the cut-off scores in the Florida test were set arbitrarily and capriciously. She stated that in the October, 1977, administration of the test, if a passing score would have been reduced by three questions, 11, 593 of the 41,724 students who failed the test would have passed it. It is interesting to note, however, that in none of the cases reviewed did the plaintiffs try to build any part of their cases on the arbitrariness of cut-off scores; nor did the Courts address the issue as a legal point.

Also at issue, according to measurement and curriculum experts, is the confusion of means and ends. When instructional validity rests on the issue of whether materials on the test were actually taught, the next logical step might be to use the test content as the core of what is taught. Calfee (16) puts it this way, "What is taught will be dictated by what is measured and measurable." He points out that the curriculum will be taken out of the hands of teachers and placed in the hands of test designers who will test what is convenient and conventional, and then shape the curriculum to match the test. Pullin (24) agrees, saying that over time, the test will determine the curriculum.

Pullin (24) has indicated that there are some clear criteria, assuming a fair test, for determining whether a student has been offered a fair opportunity to learn the knowledge and skills covered on an MCT. These criteria, found in the Debra trial Court decision involving due process protection, are as follows:

1. Students must be told the specific objectives that will be covered on the test used for graduation. This announcement must occur at the time of instruction in the objectives.

2. The curriculum offered to students must include instruction in the objectives covered on the test.

3. The acquisition of skills is a cumulative process. Students must be offered instruction in a rational and orderly sequence that affords them an opportunity to acquire proficiency through an appropriate developmental process.

4. The amount of time spent on instruction of a particular skill or unit of knowledge is important.

5. The timing of the instruction received by students is important. In addition to receiving sufficient instruction in a skill, students must be provided instruction, or review of prior instruction, at a time just prior to administration of the test.

6. The teaching process must include some mechanism for identifying whether objectives are being learned by individual students, because teaching and learning are not always coterminous.

7. Students must be offered an opportunity for remedial instruction if they have not mastered an objective.

Issue V: Educational Malpractice

The rise of educational malpractice suits in education can be viewed in terms of good news/bad news. The news, of course, is the increased potential for litigation in the practice of professional educators. The good news, according to Lynch (21), is " . . . to suffer malpractice suits, an occupation has to be recognized in common law as having some body of expertise." It must be noted, however, that education is not listed under "Malpractice" in either American Jurisprudence or Corpus Juris Secundum, the two major legal references.

Educational malpractice must be placed in the context of tort law, which is defined as a civil wrong, not involving contracts (15). Negligence, one form of tort, is defined as doing something a reasonable prudent person would do, under like circumstances (26). Four elements must be present to prove negligence. They are:

1. Duty (standard of conduct): the care which one person owes another. The level of conduct or care varies with circumstances.
2. Breach of that duty: a violation of that standard of conduct which is owed.
3. Injury: an actual, not imagined or hypothetical injury. Usually the injury is physical.
4. Proximate cause: the establishment of a causal relationship between the breach of duty and the injury.

The landmark case in educational malpractice is that of Doe v San Francisco (10), heard in the California Court of Appeals in 1979. In this case the plaintiff, an 18-year-old male, graduated from a San Francisco high school. Later, he charged the system and its employees with negligence, indicating that he graduated with a fifth-grade education, and suffered damages based on his "permanent disability" and ability to gain meaningful employment. The Court, in ruling for the district and against the plaintiff, cited various rationales for his decision, but among them was the following: " . . . classroom methodology affords no readily acceptable standards of care, or cause, or injury. The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught . . . Achievement of literacy in the schools, or its failure, are influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers." (10)

Thus, it appears that the court in effect is saying that there is at this point no well-defined duty or standard of care to which the schools can be held accountable. However, this point could be altered by the rise of MCT. As Carter (17) put it, "Will competency testing provide greater opportunity for individuals to seek relief through the judicial system for apparent failures of education to discharge its duty?"

For educational malpractice to be proved, a breach of a standard of care must be causally linked to a real injury. By establishing minimum competency tests as a graduation requirement, the educational establishment may be coming closer to defining that standard of care. If those standards (minimum competencies) are defined, but students are not provided opportunities to attain them through opportunities to learn and/or remediation, that lack could be interpreted as a breach of a defined standard, linking that breach to an injury. McClung feels that MCT does have the potential for causing injury. He states, "Using test results as a primary basis for any decision that will cause serious harm to students raises initial legal question."

Harris (20), in quoting Abel, states, "If courts accept in theory that there are certain requirements all schools face in order to educate students, (they may be) . . . requiring that they educate students to a certain minimum standards or face possible court action for damages."

It must be pointed out, however, as the court so aptly did in the Doe Case, that a causal relationship is obfuscated by the potential non-school effects on learning and achievement. Even within the schools, causation becomes a problem in terms of assessing specific negligence.

Thus, while education may be some time away from successful educational malpractice litigation by plaintiffs, the MCT movement may be a means by which that day is moved closer.

Issue VI: Employment Testing

In the area of employment testing, as in competency testing in schools, the courts really do not want to get involved. They feel they do not have the expertise in the area, and Courts, as a principle, will never substitute their judgment for that of any other decision-making body, unless a point of law is breached.

The point of law which competency testing typically infringes is the area of discrimination. Alexander states (15): It is clear that unusually high percentages of blacks score relatively low even when tests are corrected for so-called cultural bias. Specifically, at the federal level, the concern involves the equal protection clause of the 14th Amendment, and Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment practices based on race, color, religion, sex, or national origin.

A number of Court cases will be instructive.

The first is Griggs v Duke Power Co. (11), which was heard by the US Supreme Court in 1971.

Griggs was a class action suit brought by black employees against Duke Power Co. in North Carolina. Prior to 1965 (the effective date of the Civil Rights Act of 1964), the company openly discriminated on the basis of race, in hiring blacks in only one department of the company, the Labor Department. In 1965, when the company abolished this policy, it made the completion of high school as a condition for transfer or initial employment. A further requirement added later was the passing of two professionally prepared aptitude tests, along with graduation from high school. The tests were the Wonderlic Personnel Test for general intelligence, and the Bennett Mechanical Aptitude Test. The cut-offs were approximately the national median scores for high school graduates, thus making the acceptability more stringent than completion of high school.

The case was brought to Court by black employees who did not qualify. In deciding for the plaintiffs, the Court made several significant points:

1. Under the Civil Rights Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissable classifications.

2. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited. "On the record . . ., neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the job for which it was used. Both were adopted without meaningful study of their relationships to job performance ability." (11) (The Civil Rights Act specifically authorized the use of any professionally developed ability test not designed, intended, or used to discriminate against a protected classification) (But job-related tests were the intent of Congress)

3. Permissable tests must measure the person for the job and not the person in abstract.

4. If the employer shows that its tests are "job-related," then the burden of proof shifts to the plaintiff to show that other tests or selection devices, which do not have the effect of discrimination, can serve the same purpose for the employer.

Thus, in summary, the Griggs case allowed the use of job-related tests, which it called "business necessity," and disallowed the use of any instrument which was not proved to be job-related. The case further differentiated between "effect" and "intent" indicating that even if the practice was not intended to be discriminatory, it was impermissible if the "effect" of it "froze" the discrimination of past history.

A second case, Washington v Davis (12), 1976, in the US Supreme Court, rejected the "effect" standard of Title VII, as it upheld the validity of a written examination of verbal skills used to select recruits for the

Washington, D. C. police force. The Court here said that the mere showing that a higher percentage of blacks failed the test was insufficient to establish a claim of racial discrimination. The burden of proof on the plaintiff is to show that the test has a racial discriminatory purpose (intent), not just results, or effect. The Court did outline some criteria to show discriminatory purpose:

1. Historical background.
2. Specific sequence of events leading to implementation of the testing program.
3. Departure from accepted practices and normal procedures.
4. Legislative and/or administrative history of the program.

The Court in Washington v Davis also discussed test validation. The test had been validated as to relationship with performance in the recruit training program, but not directly with performance as a police officer. The Court was satisfied with that approach to validation of "job-relatedness". Thus, test validation with a training program rather than directly with specific job performance became the acceptable legal standard for job-relatedness, or as the Court calls it, "business necessity".

In the third case, US v South Carolina (13), the US Supreme Court in 1978 allowed the use of the National Teacher Examination in that state for certification of public school teachers. The results of this case reinforced the acceptability of test validation linked to a training program rather than to specific job performance. This judgment reversed a trend of lower court cases which held that the NTE was a constitutionally inappropriate measure of a school teacher's ability to teach.

Here again, the burden of proof on the part of the plaintiff was to show a discriminatory purpose, rather than effect, even though the past showed

that the scores would disqualify a greater proportion of black applicants. Interestingly, the Court held for the state in spite of the state's long history of resisting school desegregation.

In summary, the legal aspects of employment testing center around discrimination, specifically, the equal protection clause of the Fourteenth Amendment and Title VII of the Civil Rights Act.

It appears that the courts are moving away from the standard of "effect", i.e., the results of the tests are discriminatory and thus impermissible; and toward the standard of "intent," a much more difficult standard to prove.

The standards, however, are applied only after the defendant has proved the job-relatedness of the test itself. If this cannot be shown, the plaintiffs appear to be winners. If the defendant can prove this, then it becomes the burden of the plaintiff to show that the employment test or practice has a discriminatory intent.

Finally, it appears that from a legal interpretation, the definition of job-relatedness has expanded. It would seem now that for test validation purposes, courts are willing to accept the relationship of test to training program rather than, or as well as, the relationship of test to specific job-relatedness.

Conclusions

1. The state has the right to employ MCT as a requirement for the high school diploma. There is a compelling state interest in the quality of education and of the high school diploma awarded, and MCT is one reasonable means of ensuring that quality.
2. Adequate advance notice of a change in the high school diploma award criteria must be given to comply with due process requirements. The less

likely the student is to have received adequate instruction relative to the MCT, the more prior notice is necessary. This is particularly true for students coming from previously segregated schools and students with handicaps.

3. MCT does not violate the Education for All Handicapped Act (94-142) or the Rehabilitation Act if procedural modifications are adopted to accommodate the handicap, without which the student's opportunity to demonstrate his knowledge of the material would be impaired. Modification for physical handicaps will safeguard compliance.
4. Modification of the substance of the MCT for students with learning handicaps is not required for compliance with either 94-142 or the Rehabilitation Act. It has been indicated that substantive modifications would render the test meaningless.
5. It is critical to be able to document that substantive material on the MCT was actually taught in the classrooms. Instructional validity appears to be a crucial element in fairness of the test. It is not necessary, however, to show that every page and problem of every textbook was covered in every class.
6. The implementation of MCT as a graduation requirement implies the right to remediation on the part of the student. If the system dictates that students must pass with a given score, it is encumbent on that system to provide adequate opportunity for students to learn the material to pass the MCT. Further, it is desirable for cut-off scores to be based on some rationale and logic consistent with educational practice and experience.
7. It is important that the MCT be an integral part of the district's philosophy of education, related to its goal of equipping students with

basic skills, functional literacy, life skills, etc. The MCT as a graduation requirement should not be cosmetic, or an add-on just to appease a vocal public concerned with some vague notion of accountability.

8. Educational malpractice, litigation, while increasing in number, are not being won by the plaintiffs. This primarily is due to the lack of definitive "standard of care" in teaching/learning, as well as the lack of ability to show proximate cause between a breach of duty and injury. MCT may impact this situation by providing an opportunity for plaintiffs to make a more specific charge against breach of duty, and for courts to recognize a standard and a potential breach.
9. While the legal differentiation between "intent" and "effect" of testing is blurring, groups that employ testing for significant decisions in the lives of individuals it tests should be able to document that intentional discrimination was not one of its purposes, even though the results may produce a discriminatory effect.
10. Groups employing tests for significant decisions in the lives of individuals should be able to document the relationship of the test to performance. This is necessary whether performance be competency in basic skills, functional literacy, or job tasks. In job testing, it appears that courts are accepting a showing of relationship between test and training program, rather than a more stringent relationship of test to on-the-job performance.

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